Petition

81-720

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

JESSE CLEVELAND

Petitioner

vs.

ROBERT J. NOLAND,
BARBARA WILLIAMS, and
SUSAN DONEHOO,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF
APPEALS OF THE UNITED STATES

JESSE CLEVELAND
215 Copeland Road N.E.
Atlanta, Georgia 30342
404-256-0888

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QUESTIONS PRESENTED

1. Whether the law of Georgia permits the Georgia Attorney-General and his employees to legally represent a Georgia superior court judge accussed of malpractice, in a federal district court.
2. Whether a Georgia superior court judge enjoys total immunity if he twarts the constitutional right of a litigant to appeal a judicial decision made by that judge.
3. Whether an appeal from a Georgia superior court to the Court of Appeals of Georgia should have been dismissed by a Georgia superior court judge because the court reporter's transcript was not prepared by order of the superior court judge until an assessment was paid by the litigant.
4. Whether the petitioner's complaint should have been dismissed in federal district court against an respondent Georgia sup-

erior court clerk who did not have absolute legal immunity.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Jesse Cleveland, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Fifth Circuit court of Appeals of the United States entered in the above entitled case on August 19, 1981.

Opinions Below

The opinion of the Fifth Circuit Court of Appeals of the United States is unreported and is printed in Appendix A hereto, page 18. The judgment of the United States District Court For the Northern District of Georgia is printed in Appendix A hereto, infa, page 23.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals of the United States (Appendix A, infa, page 18) was entered on August 19, 1981. The jurisdiction of the Supreme Court is invoked under 28 USCA § 1257.

STATUTES INVOLVED

Georgia Code § 40-1610 provides that the Governor of Georgia shall have the power to direct the Georgia Department of Law through the state Attorney-General to institute and

prosecute in the name of the state such matters as he shall deem to be in the best interests of the people of the state.

Georgia Code § 6-808(a) requires state court clerks to prepare the appellate record within 10 days of the notice of appeal filing date, or apply for an extension of time todo so.

STATEMENT OF CASE

The petitioner filed a complaint against the respondent Douglas County, Georgia, officials in the United States District Court for the Northern District of Georgia. The complaint set out a number of violations of Georgia legal requirements for Georgia state court officials to meet in processing an appeal of a judicial decision from a Georgia trial court to the Georgia Court of Appeals.

The respondents moved to dismiss the compl

aint, and the petitioner replied by briefs.

In an order entered January 14, 1981, the District Court Judge granted the motions to dismiss of respondents Robert J. Noland and Barbara Williams, but denied that of respondent Susan Donehoo subsequently.

An appeal was taken to the Fifth Circuit Court of Appeals of the United States, which affirmed the judgment of the District Court on August 19, 1981.

REASONS FOR GRANTING WRIT

The petitioner, Jesse Cleveland, brought an action in the United States District Court for the Northern District of Georgia pursuant to 42 USC § 1983 and the due process clause of the Fourteenth Amendment to the United States Constitution. The complaint stated that Cleveland was formally the plaintiff in a civil action in the Superior Court of Douglas County, Georgia,

styled Jesse Cleveland, plaintiff v. Jim Smith, defendant # 78-9959. The complaint further showed that the trial court judge, respondent Robert J. Noland, granted a motion to dismiss by Smith.

Thereafter Smith filed a motion to dismiss petitioner Cleveland's appeal from that judgment setting forth the alleged grounds that the notice of appeal filed by Cleveland was premature and also that the appeal should be dismissed on the grounds of undue delay.

The said motion was granted by order of respondent Noland.

The allegations in the federal district court complaint in support of Cleveland's claim against respondent Barbara Williams declare that Williams as Clerk of the Superior Court of Douglas County, Georgia,

failed and refused to prepare the appellate record in the civil case of the petitioner, causing Cleveland to lose his right of appeal. Respondent Williams deliberately failed to seek an extension of time to prepare the appellate record and protect the appellant's recourse to the Georgia Court of Appeals.

In federal district court, the petitioner formally questioned the legal right of the Georgia Attorney-General and his staff to legally represent the respondent, Noland, a Georgia superior court judge, and moved for a vacation of the pleadings filed by the office of the Georgia Attorney-General for that respondent.

The respondent state court judge was not unconditionally immune for committing non-judicial, malicious acts.

Under the Supreme Court of Georgia

decision in Gault v. Wallis, 53 Ga. 675, it is well known that Georgia state court judges do not have unconditional immunity to run rough shod over litigants before their courts.

Maxwell v. Cumming, 58 Ga. 388 established the principle that a judicial official in Georgia is legally responsible for exceeding his ministerial powers.

When the respondent state court judge directed the respondent state court clerk, Williams, not to prepare the appellate record in the petitioner's Georgia state court case, and ordered the court reporter, his employee, not to prepare the transcript for the petitioner's appeal to the Georgia Court of Appeals until the petitioner paid an unreasonable "assessment", respondent

Noland was engaged in non-judicial and ministerial acts for which he was legally responsible to the appellant in damages.

Also Gault v. Wallis, supra, provides the fundamental principle that a Georgia state court judge is legally responsible for acting maliciously without any pretence of legal authority.

In the Georgia superior court case of Jesse Cleveland v. Jim Smith, supra, in Douglas County, Georgia, Superior Court, respondent Robert J. Noland, acted maliciously from the pre-trial conference when he stated that "his court had better cases to try", and refused to voluntarily recluse himself from the petitioner's case; to the trial of that case when respondent

Noland repeatedly slandered the petitioner in the courtroom, helped opposing counsel make objections to the petitioner's case in the presence of the jury, and cross examined the petitioner on the witness stand, as well as cross examining the petitioner's witness.

All of this behavior was clearly non-judicious.

In Stump v. Sparkman, 435 U.S. 349, it is well established by way of definition in the syllabus on page 350 that the factors determining whether an act by a judge is "judicial", relates to the nature of the act itself (whether it is a function normally performed by a judge).

On page 361, footnote 10, ibid, this Court demonstrates that United States Courts of Appeal have concluded that the challenged actions of defendant judges were not performed as part of the judicial function and that the said judges were not

performed as part of the judicial function and that the judges were not entitled to rely upon the doctrine of judicial immunity. The Court of Appeals for the Ninth Circuit has held that a justice of the peace who was accused of forcibly removing a man from his courtroom and physically assualting him, was not immune for the said tort, Gregory v. Thompson 500 F. 2d 59 (1974).

Obviously telling a state court clerk not to prepare an appellate record; and a court reporter not to process the court reporter's transcript, are non-judicial functions for which liability attaches. As a result, the complaint of the petitioner should not have been dismissed as to respondent Noland.

Respondent Noland was improperly represented by the Georgia Attorney-General.

There is no constitutional or legal provision permitting the Attorney-General of

Georgia or any of his employees to defend a Georgia superior court judge in a civil malpractice cause of action.

The motion to dismiss the petitioner's complaint on behalf of respondent Noland was filed by Don Langham, assistent attorney general of Georgia. His "legality" in defending the respondent Noland could only be maintained through some provision of Georgia law authorizing the office of Georgia Attorney-General to represent a Georgia state court judge.

In Walker, Attorney General v. Georgia Railroad and Power Co., 146 Ga. 655 (1917), the Supreme Court of Georgia set the limit of representation of the Attorney General of Georgia when that court stated that where the Georgia Constitution creates an office and

prescribes the duties of the holder thereafter, and declares that other duties may be imposed on him by statute; that officer has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions.

State ex rel. Boykin v. Ball Investment Co., 191 Ga. 382 (1940), also indicates that even if the Governor of Georgia had expressly directed the Georgia Attorney-General to prosecute a particular case, the Attorney-General's action would be precluded entirely if the Attorney-General failed to cite that mandate in the law suit itself. There is no such mention in this case.

Further, even if the Governor of Georgia, had directed the Attorney-General of Georgia

to defend Noland, that directive would be illegal.

Georgia Code § 40-1610 provides that the Governor of Georgia shall have the power to direct the Georgia Department of Law through the state Attorney-General to institute and prosecute in the name of the state such matters as he shall deem to be in the best interests of the people of the state.

Respondent Noland's motion to dismiss the petitioner's complaint was not brought in the name of the State of Georgia, and should have been vacated.

The district court judge dismissed the petitioner's cause of action against respondent Barbara Williams because the petitioner

allegedly "failed to identify any action by respondent Williams which could be said to have contributed to respondent Noland's decision to dismiss the petitioner's state court appeal".

This view is clearly incorrect and misinformed. In paragraph five of the complaint in district court, the petitioner stated that "after a notice of appeal was filed by the plaintiff, the clerk of the Superior Court of Douglas County, Georgia, co-defendant Barbara Williams, without notifying the plaintiff, although such would have been possible by a local telephone call, refused to prepare the appellate record, citing such bogus excuses as no appeal was possible since the notice of appeal was null and void; or that the court reporter transcript was not prepared".

In paragraph six of the same complaint, the petitioner pointed out that respondent Williams took this position in order to deny

the petitioner his constitutional right of appeal and to prevent Georgia's appellate courts from reviewing the official record of respondent Noland's gross misconduct.

Since the district court judge ruled that respondent Williams did not have absolute immunity as a court clerk, there was more than enough issues involved in the petitioner's cause of action to maintain jurisdiction over Williams.

Further, the fact that respondent Williams still refused to prepare the appellate record in the petitioner's state court appeal after the petitioner personally notified Williams that by provision of Gillen v. Bostick 234 Ga. 308 (1975), the petitioner's notice of appeal was not premature; was inexcusable and an express violation of Georgia

Code § 6-808(a) which requires Georgia state court clerks to prepare the appellate record within 10 days of the notice of appeal filing or apply for an extension of time to do so. This was not done by respondent Williams.

Conclusion

The failure of the Supreme Court of Georgia to enforce the Georgia statutory requirements regarding the preparation and filing of appeals to Georgia's state appellate courts, has led to a widely spread practice in some Georgia county courts of deliberately failing to prepare appeals or to overcharge by way of unreasonable "assesments" to promise to do so.

Certificate Of Service

I certify that I have served a copy of this application on the attorneys for the respondents at their law offices as follows:

Attorney General Mike Bowers
State Judicial Building
Washington Street S.E.
Atlanta, Georgia

Harvey Gray
Suite 2400
First National Bank Tower
Marietta Street N.W.
Atlanta, Georgia

This __ day of September, 1981.

Jesse Cleveland

APPENDIX A

Opinions Below

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 81-7312

Summary Calendar

JESSE CLEVELAND,

Plaintiff-Appellant,

versus

ROBERT J. NOLAND,
BARBARA WILLIAMS, and
SUSAN DONEHOO,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

---

August 19, 1981

Before RONEY, KRAVITCH, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal from a judgment entered in favor of Judge Noland and Clerk of Douglas Superior Court Barbara Williams. Jesse Cleveland brought this § 1983 suit against them claiming that their actions combined to deny him his right of appeal from judgment following a directed verdict against him in a libel action that Cleveland was prosecuting pro se in Judge Noland's court.[1/]

1/Cleveland also joined as defendant below Susan Donehoo, the court reporter responsible for transcribing the testimony in Cleveland's libel proceedings. The lower court concluded that disputes as to

issues of material fact precluded summary judgment for her. The cases against Judge Noland and Ms. Williams are properly before us as a result of the lower court's determination that there was no just reason for delay and her direction of entry of judgment for those defendants. F.R.Civ. P. 54(b)

The lower court concluded that the actions of Judge Noland challenged in the complaint "were carried out by him in his judicial capacity" in a matter within the jurisdiction of his court, and that he was therebore absolutely immune from suit under § 1983. R., 198. Cleveland's sole remedy as against Judge Noland, therefore, lay in the Georgia Court of Appeals, no less

so for the actions of which he complained at trial than for the order dismissing his appeal. As to the former, Cleveland failed to perfect his appeal in accordance with Georgia law; as for the latter, it appears that Cleveland sought no relief in the Georgia appellate courts before seeking a remedy in the district court to which the state trial judge was immune.

As for defendant Williams, the lower court found, on the basis of the record in the libel proceedings, that Cleveland's appeal was dismissed by Judge Noland because of Cleveland's unreasonable and inexcusable delay in tendering the transcript of the state trial proceedings to the Clerk of Superior Court, as he was required to do under Georgia law before the Superior

Court record could be forwarded to the Georgia Court of Appeals. See GA. Code ss 6-805(c), 808 (a) (1978). The lower court concluded, therefor, that inasmuch as Cleveland's complaint failed to allege how Ms. Williams' actions in any way contributed to his failure to have the transcript ready within a reasonable time, there was no dispute as to any issue of material fact respecting her liability under § 1983, and summary judgment was entered accordingly.

We have carefully reviewed the record in this case, including the transcript of the state trial proceedings, and we find no error in any of the lower court's findings or conclusions. The judgment below is therefore

AFFIRMED.

Opinion No. 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JESSE CLEVELAND

vs.

CIVIL ACTION

No. C80-1667

ROBERT J. NOLAND, BARBARA WILLIAMS, and SUSAN DONEHOO

ORDER

This action alleging violation of 42 U.S.C. § 1983 is now before the Court on Defendant Williams' Motion for Summary Judgment, Defendant Noland's Motion to dismiss or in the Alternative for Summary Judgment, Plaintiff's Motion for Production of Documents.

On July 24, 1978, Plaintiff in this action filed a libel suit in the Superior Court of Douglas County, Cleveland v. Smith, Civil Action No. C78-9959, and represented himself at trial before Judge Robert J. Noland, who is named as a defendant in this case. Plaintiff, who is an attorney, alleges herein

that Defendant Noland repeatedly slandered him in his professional capacity in open court, that Judge Noland aided the counsel for the defendant in making objections to Plaintiff's case in the presence of the jury, and that Judge Noland cross-examined Plaintiff when he testified. On September 26, 1979, at the conclusion of Plaintiff's case , Judge Noland directed a verdict for defendant, and he entered judgment in accordance with that order on October 3, 1979. Plaintiff filed a notice of appeal on October 2, 1979. Judge Noland dismissed Plaintiff's appeal on April 30, 1980, stating that the notice, having been filed prior to entry of the judgment on the verdict, was premature and thus invalid and also that Plaintiff's delay in filing the transcript

was both unreasonable and inexcusable. Plaintiff alleges that Defendants Williams (the court clerk) and Donehoo (the court reporter), at the direction of Judge Noland, caused the delay in his filing the transcript. He contends that the delay was caused by Williams refusal to prepare the trial transcript until Plaintiff paid an "assessment" in advance and then her refusal to send Plaintiff his copy of the transcript.

The Court finds that all acts attributed to Defendant Noland were carried out by him in his judicial capacity and therefore he is absolutely immune from liability under 42 U.S.C § 1983. See Stump v. Sparkman, 435 U.S. 349 (1978). Plaintiff has moved to vacate Defendant Noland's motion on the ground that

Defendant Noland is improperly represented by the Attorney General of Georgia. This Court finds that Defendant Noland is being sued in his capacity as a state official and that it is clearly proper for the office of the Attorney General of Georgia to act on his behalf. Therefore, Plaintiff's motion is totally without merit.

Defendant Williams' motion is based on her contention that no act or omission by her was the proximate cause or a contributing cause of the dismissal of Plaintiff's notice of appeal. In the dismissal order entered by Judge Noland on April 30, 1980, the two conclusions of law were as follows:

> THE COURT CONCLUDES as a matter of law that although the Notice of Appeal was filed one day prior to the judgment, the same was timely filed under the spirit and intent of the Civil Practice Act.
>
> THE COURT finds that the delay in filing

the transcript was both unreasonable and inexcusable.

On May 2, 1980, Judge Noland amended his dismissal and replaced the first conclusion of law with the following:

> The Notice of Appeal filed prior to the entry of the Judgment on the Verdict was premature and thus invalid. See Moore v. Moore, 229 Ga. 600; Harrison v. Harrison, 229 Ga. 692.

This Court notes that both Moore and Harrison, relied on by Judge Noland, involved the filing of a motion for new trial prior to the entry of judgment on the verdict rather than the premature filing of a notice of appeal as was done by Plaintiff.

It is clear that Judge Noland's original reason for dismissing the Plaintiff's appeal was Plaintiff's delay in filing the transcript

Plaintiff has alleged that Defendant Williams refused to prepare the appellate record but has not alleged that she was involved in the delay of the transcript. Instead, Plaintiff places the responsibility for the delay in filing the transcript on Defendant Donehoo, the court reporter. Although clerks of court generally have qualified immunity only, see Williams v. Ward, 612 F.2d 892 (5th Cir. 1980), Plaintiff has failed to identify any action by Defendant Williams which can be said to have contributed to Judge Noland's decision to dismiss Plaintiff's appeal. Therefore, summary judgment for Defendant Williams is appropriate.

Plaintiff has filed a Motion for Production of Documents, along with his Complaint, on September 24, 1980, seeking a

copy of the court reporter's transcript of his state civil trial, Cleveland v. Smith. No. 78-9959. which he says is presently in the possession and/or custody of Defendant Williams. The proper method for obtaining the transcript is for Plaintiff to serve Defendant Williams with a request to produce pursuant to Rule 34, Fed.R.Civ.P which could be followed by a motion to compel production if Plaintiff is not satisfied with the response to his request.

In light of the preceding analysis, Defendant Williams' Motion for Sumary Judgment is hereby GRANTED, Defendant Noland's Motion to Dismiss is hereby GRANTED, Plaintiff's Motion to Vacate is hereby DENIED, and Plaintiff's Motion for Production of Documents is hereby denied.

SO ORDERED, this 14 day of January, 1981.

ORINDA D EVANS
United States District Judge